No. 82-1793

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD,
and DIRECTOR OF THE DEPARTMENT OF
ALCOHOLIC BEVERAGE CONTROL,
Petitioners,

vs.

LEWIS-WESTCO COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

BRIEF IN OPPOSITION

DANIEL B. LERAUL
LELAND, PARACHINI, STEINBERG,
FLINN, MATZGER & MELNICK
333 Market St., 27th Floor
San Francisco, CA 94105
Telephone: (415) 957-1800
Attorneys for Respondent

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

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REASONS FOR DENYING THE WRIT

None of the factors that make a case important to the administration of law will be presented by review of this case. The Decision of the California Court of Appeal correctly applied well established principles of antitrust law to determine that California's wholesale liquor price posting law is in conflict with federal law. Reaffirmation of that decision is not necessary to resolve other pending cases or to resolve conflicts between courts.

The California Court of Appeal annulled the order of the Alcoholic Beverage Control Appeals Board in which it

reluctantly upheld sanctions against respondent, Lewis-Westco & Company, for violations of Business & Professions Code Section 24756.[1] That code section required liquor wholesalers to file with the Department of Alcoholic Beverage Control the prices they would charge during a period subsequent to the filing. During the posting period prices could not be adjusted except to match a lower posted price of another wholesaler.

The Court of Appeal observed that:

> Under the challenged statute, licensed wholesalers are required to announce their prices in advance by posting them with the Department and, under sanction of penalty, are prevented from making sales to retailers at different prices.
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> . . .
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> Moreover, as the [Appeals] Board concluded, subdivision (f) of the implementing rule literally "invites periodic examination of the price lists on file" thus assuring other competitors that the filing licensee will not sell its product to anyone at a lower price. In plain effect, the mandated price posting, coupled with the regulatory compliance condition, openly sanctions and promotes an exchange of price information among competitors calculated to produce a uniform price structure vividly demonstrating the absence of free and unfettered competition in the wholesale liquor industry.
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> *Lewis-Westco & Company v. Alcoholic Beverage Control Appeals Board,* (1982) 136 C.A.3d 829, 835-836.

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[1]While the Board found that "the statute and rule in question [§ 24756 and Title 4, California Administrative Code § 100] are part of the scheme for the fixing of prices", (Appendix to Petition for Certiorari p. 37), it affirmed the Department's decision because § 3.5 Article III of the California Constitution prohibits the Board from declaring a statute invalid.

Upon this factual basis the Court of Appeal held that Section 24756 was intended and did restrain horizontal price competition. *Lewis-Westco,* p. 836. That holding is consistent with a long line of decisions by this court. In 1922 this court found a central exchange to which participants divulged the price at which they had sold their product to identified customers and for which penalties were imposed for failure to supply such information violated the Sherman Act. *United States v. American Linseed Oil Co.,* 262 U.S. 371 [67 L.Ed. 1035] Again, in 1968 this court found that exchange of pricing information which identified the customers violated the Sherman Act. *United States v. Container Corp. of America,* 393 U.S. 333 [21 L.Ed.2d 526]. Since Section 24756 required all sales to be at the posted price, there is sufficient identification of the customers to bring the present case within the rule announced in *American Linseed Oil* and *Container Corp.* In *Sugar Institute v. United States,* (1935) 297 U.S. 553 [80 L.Ed. 859] this court held that such an exchange of future prices together with enforced compliance with such prices was illegal.

> The unreasonable restraints which defendants imposed lay not in advance announcements, but in the steps taken to secure adherence, without deviation, to prices and terms thus announced. It was that concerted undertaking which cut off opportunities for variation in the course of competition however fair and appropriate they might be. (At p. 601)

This court has characterized the *Sugar Institute* case as holding such enforced price posting arrangements were *per se* violations of the Sherman Act. *Catalano, Inc. v. Target Sales, Inc.* (1980) 446 U.S. 643, 647 [64 L.Ed.2d 580]

The California Court of Appeal found that the anti-competitive evil of Section 24756 was the stabilization of liquor prices, *Lewis-Westco* p. 839 and interference with price competition. *Lewis-Westco* p. 835. More than 40 years ago this court first held such price stabilization, no matter how reasonable the stabilized prices were, constituted a *per se* violation of the Sherman Act. *United States v. Socony-Vacuum Oil Co.* (1940) 310 U.S. 150, 222 [84 L.Ed. 1129] Since then this court has consistently adhered to that decision. See: *Arizona v. Maricopa Medical Society* (1982) ..... U.S. ..... [73 L.Ed.2d 48], *United States v. Parke Davis & Co.* (1960) 362 U.S. 29 [4 L.Ed.2d 505].

In *Rice v. Norman Williams Co.* (1982)..... U.S. ..... [73 L.Ed.2d 1042] this court reviewed the circumstances where the Sherman Act would preempt state statutes:

> In determining whether the Sherman Act preempts a state statute, we apply principles similar to those which we employ in considering whether any state statute is preempted by a federal statute pursuant to the Supremacy Clause. p. 1049.

The court went on to hold that:

> Such condemnation will follow under § 1 of the Sherman Act when the conduct contemplated by the statute is in all cases a per se violation. p. 1051.

The cases mentioned above establish that an enforced exchange of future price information coupled with enforced compliance with those announced prices is precisely the type of *per se* violation of the Sherman Act which will preempt a state statute. In addition the California Legislature has forthrightly stated that the purpose of Section 24756 is

to stabilize prices[2], which purpose is always contrary to the Sherman Act.

In reaching its decision the California Court of Appeal correctly applied well established principles of law that have been consistently developed by this court over the past six decades. This case presents no issues that will assist this court in clarifying new issues of antitrust law. In an express effort to stabilize prices the California Legislature established the type of price information exchange that has been held to be a *per se* violation of the Sherman Act. That pricing arrangement is preempted by the Sherman Act unless it is exempted as state action or by virtue of powers granted the state by the Twenty-first Amendment.

The second and third questions for review listed by the petitioner invite this court to reiterate the amount of involvement required by a state before its legislative enactments are outside of the scope of federal antitrust law because action required under such legislation involves acts of the state. Again this issue is not novel nor are

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[2]The Legislative purpose for Section 24756 and the other provisions of Chapter X of the Alcoholic Beverage Control Act is set forth in Business & Professions Code Section 24749 which reads in full: "It is the declared policy of the State that it is necessary to regulate and control the manufacture, sale, and distribution of alcoholic beverages within this State for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to the law. In order to eliminate price wars which unduly stimulate the sale and consumption of alcoholic beverages and disrupt the orderly sale and distribution thereof, it is hereby declared as the policy of this state that the sale of alcoholic beverages should be subjected to certain restrictions and regulations. The necessity for the enactment of the provisions of this chapter is, therefore, declared as a matter of legislative determination."

decisions of the lower courts in conflict. This court, in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.* (1980) 445 U.S. 97 [63 L.Ed.2d 233], held that unsupervised private pricing which is enforced by the state does not constitute an act of the state.

> The State simply authorizes price-setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any "pointed reexamination" of the program [footnote omitted]. The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement. As Parker teaches, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. . . . 317 U. S. at 351 *Midcal* pp. 105-106

In *Midcal* this court set out a two part test for determining whether a state was sufficiently involved in a restrictive trade policy to immunize that activity from federal antitrust law.

> First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; and second, the policy must be "actively supervised" by the State itself. (cites omitted) *Midcal* p. 105

Petitioners urge that Section 24756 involves state action since wholesalers are compelled to post their own prices rather than prices binding upon others. Petitioner's Brief

pp. 5-7. The fact that the state compelled posting of prices did not prevent review of the state's legislation under anti-trust principles in *Midcal* nor in *Rice v. Alcoholic Beverage Control Appeals Board* (1978) 21 Cal.3d 431. Nor does the selection of who sets an anti-competitive price affect our analysis. Whether one wholesaler sets prices for every other wholesaler; the wholesalers meet to agree upon an acceptable price; or the wholesalers merely exchange so much information concerning their future prices that acting in their own interests they will invariably set identical prices; does not alter the involvement of the state. The particular method by which wholesalers are authorized under state legislation to achieve anti-competitive prices does not affect the involvement of the state.

If we compare the involvement of the state in effectuating the price stabilization policy under Section 24756 with that used in the legislation condemned in *Midcal,* we find that the involvement of the state is exactly the same. In the *Midcal* case, the state designated the private party who would set prices, required that those prices be posted and enforced any deviation by wholesalers from the posted prices. In Section 24756 the state designates more people as price setters but still designates who will establish liquor prices. It accepts those prices for posting and enforces compliance. There is no pointed reexamination of those prices or the appropriateness of stabilizing prices at the levels achieved under Section 24756. Thus the *per se* anti-competitive pricing required by 24756 is not established by an act of the state nor is it subject to pointed reexamination.

The Department's argument that prices are set by wholesalers for themselves rather than by selected wholesalers

for all others is not on point as the California Court of Appeal noted:

> Nor do we comprehend the Department's insistent claim that it is the individual wholesaler who sets his own price rather than the state or others. It is the very existence of an essentially private price fixing arrangement under statutory sanction which is repugnant to the Sherman Act policies. As long declared: "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. . . ." (*California Retail Liquor Dealers v. Midcal Aluminum, supra,* 445 U.S. 97, 104, 106 [63 L.Ed.2d 233, 242, 243-244 quoting *Parker v. Brown, supra,* 317 U.S. at p. 351 87 L.Ed. at 326]) *Lewis-Westco,* p. 847

In his attempt to bring this case before a fifth tribunal the Attorney General for the first time argues that the Wilson Act and the Webb-Kenyon Act (27 U.S.C. §§ 121, 122) indicate that Congress intended to "remove commerce clause protection from liquor". Petitioner's Brief p. 18. The Attorney General's construction of these Acts is directly contradicted by all of the decisions construing those Acts and by the historical background of the Twenty-first Amendment. This court has described the relationship between the Twenty-first Amendment and the Wilson and Webb-Kenyon Acts in *Craig v. Boren* (1976) 429 U.S. 190 [50 L.Ed.2d 397].

> The wording of Section 2 of the Twenty-first Amendment closely follows the Webb-Kenyon and Wilson Acts, expressing the framers' clear intention of constitutionalizing the Commerce Clause framework established under those statutes. at pp. 205-206.

It has been held that the language of the Twenty-first Amendment:

> [S]o closely follows the Webb-Kenyon Act as to lead us to the conclusion that it was copied therefrom and it should receive the same construction as that given the last mentioned act. *Dugan v. Bridges,* 16 F. Supp. 694, 706 (D. N.H. 1936)

The Wilson Act was enacted in 1890 in response to this court's decision in *Leisy v. Hardin,* (1890) 135 U.S. 100 [34 L.Ed 128] which undercut the theoretical underpinnings of the *License Cases,* (1847) 5 How. 504, 579. After the *Leisy* decision the power of states to regulate trade of alcoholic beverages within their borders was in question with respect to any liquor imported from another state. The passage of the Wilson and Webb-Kenyon Acts was intended to restore authority to the states to regulate trade in liquor within their borders. See *Craig v. Boren,* supra, 429 U.S. at 205

> To correct the great evil which was asserted to arise from the right to ship liquor into a state through the channels of interstate commerce, and there receive and sell the same in the original package, in violation of state prohibitions, was indisputably the purpose which led to the enactment of the Wilson Act (Act of Congress of August 8, 1890, 26 Stat. at L. 313, chap. 728, Comp.Stat. 1913, § 8738), forbidding the sale of liquor in a state in the original package even though brought in through interstate commerce, when the existing or future state laws forbad sales of intoxicants. . . .
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> . . .
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> Reading the Webb-Kenyon law in the light thus thrown upon the Wilson Act and the decisions of this court which sustained and applied it, there is no room for doubt that it was enacted simply to extend that

> which was done by the Wilson Act; that is to say, its purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through interstate commerce in states contrary to their laws, and thus in effect affording a means by subterfuge and indirection to such laws at naught. *James Clark Distilling Company v. Western Maryland Railroad Company,* (1916) 242 U.S. 311, 323-324 [61 L.Ed. 326]

Petitioner's fourth question for review requests that this court change its well-established interpretation of the legislative history behind the Wilson and Webb-Kenyon Acts and to construe them as an abandonment of Congress' Commerce Clause powers over liquor. At the same time, though, petitioner acknowledges that the Sherman Act, which is an exercise of Congress' Commerce Clause power, applies to liquor merchants. See: *Schwegmann Brothers v. Calvert Distillers Corp.,* (1950) 341 U.S. 384, [95 L.Ed. 1035] and *Midcal, supra.* Since acts of the state are not limited by the Sherman Act, *Parker v. Brown* (1943) 317 U.S. 341 [87 L.Ed. 315], in effect the interpretation petitioner seeks to apply to the Wilson and Webb-Kenyon Acts is that they authorize states to license private violations of the Sherman Act or that these Acts eliminate the need to comply with the second test for state action enunciated by this court in *Midcal.* That interpretation is not only contrary to all of the cases that have applied the Wilson and Webb-Kenyon Acts, that have interpreted the relationship between those Acts and the Twenty-first Amendment, the historical background of those Acts, but would also require this court to overturn its holdings in *Schwegmann Brothers v. Calvert Distillers Corp.* and *Midcal.*

Finally, in the fifth question listed for review the petitioner urges this court to reverse the California Court of Appeal's finding that the purpose of Section 24756 is "to promote temperance and orderly marketing conditions", *Lewis-Westco* at p. 838. Not only is the California Court of Appeal's finding correct but review of that finding will not significantly advance the administration of law.

Petitioner urges without authority or evidence that "The main state interest is the prevention of price discrimination". Petitioner's Brief p. 8. On page nine he suggests that "posting also helps prevent predatory pricing and aids pool buying by retailers . . .".

The location of Section 24756 tells us that petitioner is wrong. The Alcoholic Beverage Control Act prohibits price discrimination in Section 25503 which is a part of the Tied-House restrictions of Chapter XVII. If the Legislature intended to detect price discrimination through price posting, it would have enacted the posting requirements as part of Chapter XVII, not as part of Chapter X. Secondly, the Legislature has clearly stated its purpose for enactment of Section 24756 which was to "eliminate price wars", Business & Professions Code Section 24749. Courts have repeatedly held that price stabilization and promoting temperance were the purposes for the retail price provisions of Chapter X. *Rice v. Alcoholic Beverage Control Appeals Board* (1978) 21 Cal.3d at p. 451, *Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control* (1966) 65 Cal.2d 349 at p. 360. The court in *Schenley Affiliated Brands Corporation v. Kirby,* (1971) 21 Cal.App.3d 1977, 1984 observed that:

> Although somewhat different constitutional and economic arguments are available, the statutory demand

for adherence to posted wholesale prices is supported in part by the constitutional and economic considerations which validated the consumer price maintenance law.

The Attorney General's invented purpose is further rebutted by the second sentence of Section 24756 which regulated assortments with domestic brandy which is of no assistance in monitoring price discrimination. That sentence is simply a pricing regulation.

Further support for the finding that this statute is merely price stabilization legislation is the identity of those who have sought to intervene or file amicus briefs in this case. Neither organizations concerned with the sobriety of society nor organizations of small retailers about to face chaotic markets have sought to participate. Rather it has been the California Beer Wholesalers Association and the Wine & Spirits Wholesalers of California who have sought to participate—the very people who the Attorney General argues are being restricted by this statute. See Petitioner's Brief p. 6.

Review by this court of the decision of the California Court of Appeal is not necessary. That decision is consistent with the decisions of this court. The Attorney General argues that that decision is contrary to one issued one month later by Judge Lynch of the District Court of the Northern District of California in *Enrico's v. Rice, et al.* (D.D. Cal.No. C 81-0068EFL) and that a writ is necessary to resolve that conflict. A moment's analysis indicates that is not true. In that action plaintiff sought to enjoin enforcement of Section 24756 and to have it declared invalid. If Judge Lynch's decision was not moot when rendered, it now is because no effective remedy can be

effectuated by the federal courts in that case. Should this court grant a writ and reaffirm the California Court of Appeal decision, the relief sought by plaintiffs in *Enrico's* will have been achieved. That same result, though, can be achieved by denial of a writ in this case.

Dated: June 30, 1983

LELAND, PARACHINI, STEINBERG, FLINN, MATZGER & MELNICK

By DANIEL B. LERAUL
Attorneys for Respondent